UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and eighty-two.

Present:
HONORABLE IRVING R. KAUFMAN,
HONORABLE LAWRENCE W. PIERCE,
Circuit Judges,
HONORABLE CHARLES S. HAIGHT, JR.,
District Judge, sitting by designation.

MARVIN W. MORSE,	:	
Plaintiff-Appellant,	:	81-7644
v.	:	
S.A.R.L. de GESTION PIERRE CARDIN,	:	
Defendant-Appellee.	:	
SWANK, INC., PIERRE CARDIN, MAX J. BELLEST and COORDINATING OFFICE, INC.,	:	
Defendants.	:	

Docket No. 81-7644

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. It was proper for Judge Tenney to deny S.A.R.L.'s motion for a directed verdict and its motion for judgment n.o.v. unless the facts and inferences so favored S.A.R.L. that reasonable men could not have arrived at a contrary verdict, or the question was one of law. Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970). Viewing the evidence in the light most favorable to Morse, the party opposing the

motion, Samuels v. Health and Hospitals Corp., 591 F.2d 195, 198 (2d Cir. 1979), Judge Tenney properly found that sufficient factual issues of intent to be bound to a contract and inclusion of essential terms remained to bar a directed verdict. In the March 10 letter, Duquesnoy stated that Mr. Cardin agreed to Morse's conditions concerning royalties and duration, gave permission for supplying to commence, and set a July date for the commencement of performance. On the basis of these facts, it was reasonable for the jury to conclude that the parties had agreed to the essential terms of a contract.

2. Questions of intent to be bound only to an integrated writing translated into English, and of future negotiations concerning proliferated sources of supply were properly decided by the trier of fact, since the intent of the parties as expressed in their correspondence was unclear. Babdo Sales, Inc. v. Miller Wohl Co. Inc., 440 F.2d 962, 964-65 (2d Cir. 1971); Banking and Trading Corporation v. Floete, 257 F.2d 765, 769 (2d Cir. 1958).

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3. Lost profits may be awarded when they are the direct and proximate result of a breach of contract, even if performance has not begun. Perma Research & Development Co. v. Singer Co., 402 F. Supp. 881, 898 (S.D.N.Y. 1975), aff'd, 542 F.2d 111 (2d Cir.), cert. denied, 429 U.S. 987 (1976). S.A.R.L. may only prevail in its opposition to damages if it shows that having heard Morse's expert Dinnerman testify as to projected profit on cigarette lighter sales, the jury's award of $435,000 was based on speculation and guesswork. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946). The fact that Morse's business was not yet firmly established, and might experience reversals in the future is no bar to a damage award. Lee v. Joseph E. Seagram & Sons, Inc., 413 F. Supp. 693, 705 (S.D.N.Y. 1976), aff'd, 552 F.2d 447 (2d Cir. 1977). Since Dinnerman was closely acquainted with high-priced cigarette lighter marketing and sales, and relied on figures derived independently of those supplied by Morse, the judgment based on the jury verdict must stand.

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4. Since there was no evidence from which the jury could conclude that Duquesnoy actually knew that the Swank license included cigarette lighters, a finding of fraud must be based upon proof of such recklessness as constitutes a gross failure to investigate. State Street Trust Co. v. Ernst, 278 N.Y. 104, 112 (1938). Since a copy of the Swank agreement was on file in Duquesnoy's office, and Duquesnoy had ready access to superiors who were aware of the Swank license, the jury's finding of reckless indifference is reasonable. Judge Tenney's instructions, which stressed that even a finding of gross negligence would not support a finding of fraud, were more than adequate to inform the jury of the requisite state of mind.

5. Since innocent misrepresentation, rather than representation or deception by one party is a prerequisite to a finding of mutual mistake, mutual mistake did not occur here as a matter of law. Leasco Corp. v. Taussig, 473 F.2d 777, 781 (2d Cir. 1972).

Docket No. 81-7644

6. Accordingly, the judgment entered on the jury verdict is affirmed.

S/ _____
IRVING R. KAUFMAN

S/ _____
LAWRENCE W. PIERCE,
Circuit Judges,

S/ _____
CHARLES S. HAIGHT, JR.,
District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN W. MORSE,	:	
Plaintiff,	:	77 Civ. 5185 (CHT)
-against-	:	
SWANK, INC., PIERRE CARDIN, S.A.R.L. DE GESTION PIERRE CARDIN, MAX J. BELLEST, and COORDINATING OFFICE, INC.,	:	
Defendants.	:	
		OPINION

APPEARANCES

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TENNEY, J.

After a jury trial and a verdict for the plaintiff Marvin W. Morse, the defendant S.A.R.L. de Gestion Pierre Cardin ("Cardin") has brought a motion for a judgment notwithstanding the verdict or, in the alternative, for an order setting aside the verdict and granting a new trial. For the reasons set forth below, the motion is denied.

On a motion for judgment n.o.v., the Court must apply the same standards as are applicable to a motion for directed verdict. 5A J. Moore, Federal Practice ¶ 50.07[2], at 50-76 (1980). The Court may grant the motion only when the evidence is "'such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,'" Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737, 742

(2d Cir. 1975), cert. denied, 424 U.S. 955 (1976), quoting Brady v. Southern Ry. Co., 320 U.S. 476, 479 (1943). As explained more fully in National Auto Brokers v. General Motors Corp., 572 F.2d 953, 956 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979):

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question to the jury.

572 F.2d at 956, quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969). See also Armstrong v. Commerce Tankers Corp., 423 F.2d 957, 959 (2d

Cir.), cert. denied, 400 U.S. 833 (1970); Northeastern Tel. Co. v. American Tel. & Tel. Co., 497 F. Supp. 230, 239 (S.D.N.Y. 1980). In addition, in interpreting the trial record, the Court is "bound to view the evidence in the light most favorable to [the party opposing the motion] and to give [him] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962); Samuels v. Health and Hospitals Corp., 591 F.2d 195, 198 (2d Cir. 1979). Finally, "since the grant of the motion would deprive a litigant of the opportunity of having the issues determined by a jury, the motion should be 'cautiously and sparingly granted.' 9 Wright & Miller, Federal Practice and

Procedure § 2524, at 542." Lee v. Joseph E. Seagram & Sons, Inc., 413 F. Supp. 693, 696 (S.D.N.Y. 1976), aff'd, 552 F.2d 447 (2d Cir. 1977).

In this case, the plaintiff's remaining theories at the time of trial rested upon breach of contract and fraudulent misrepresentation. From the summer of 1976 through March 1977, Morse negotiated with a representative of Cardin about an exclusive license to sell premium quality cigarette lighters bearing the Pierre Cardin name and trademark. Morse alleged that the parties had agreed upon all of the essential terms of their contract, making their agreement binding and enforceable. The defendant conceded that Morse and Cardin had negotiated an agreement on several important terms of their contract, but asserted that many

essential terms, including the requirement of a written instrument, were never finalized, thereby leaving the parties' agreement incomplete and unenforceable. In addition, the defendant argued that the parties labored under a mutual mistake as to the availability of the license for cigarette lighters, thereby precluding any enforceable contract on the subject. (The license for selling Cardin lighters in the United States had already been given to Swank, Inc., a distributor of men's and women's furnishings. The license was included in a 1967 agreement between Swank and Cardin.) On the claim of fraud, Morse alleged that Cardin's representative, Herve Duquesnoy, intentionally or recklessly misrepresented the availability of the license, thereby causing Morse to incur certain financial expenses in reliance

on Duquesnoy's conduct. In response, the defendant argued that Duquesnoy's mistake was innocent, or at most negligent, but that there was no evidence whatsoever of recklessness or intentional misrepresentation.

After deliberating on the issues posed, the jury returned a verdict for the plaintiff. In its answers to special interrogatories, the jury said that the parties had reached an agreement on all essential terms, thereby forming an enforceable contract, that there was no mutual mistake, and that Duquesnoy had fraudulently or recklessly misled Morse. On the issue of damages, the jury awarded $453,000. This amount must have represented lost profits on the license contract, since the plaintiff asked for only one dollar's damages if the jury found fraud, and since the Court in-

structed the jury not to reimburse the plaintiff for his expenses if it found that the contract would have been profitable.

In its memorandum in support of the motion for judgment n.o.v., the defendant makes five general points. First, Cardin argues that, as a matter of law, there was no contract between the parties. Second, Cardin asserts that there was no evidence whatsoever for a finding of fraudulent misrepresentation. Third, Cardin argues that, as a matter of law and equity, the Court should rescind the contract, if any, on the ground of innocent mutual mistake. Fourth, Cardin states that the plaintiff's evidence on damages was insufficient to permit an award for lost profits. Fifth, Cardin argues that Morse is not the real party in interest. In response, the plaintiff

refutes each of the defendant's positions and asserts that the verdict is supported by adequate evidence and should be allowed to stand. The Court will treat each argument in the order presented.

Existence of a Contract

The existence of a contract turned on whether the parties had agreed on all of its essential terms and on whether the writings received in evidence adequately reflected the agreement. "The law is clear that although the parties may intend to enter into a contract, if essential terms are omitted from their agreement, or if some of the terms included are too indefinite, no legally enforceable contract will result." V'Soske v. Barwick, 404 F.2d 495, 500 (2d Cir. 1968), cert. denied, 394 U.S. 921 (1969). In addition, the license

contract, if any, was subject to New York's statute of frauds because it would require more than one year to perform. N.Y. Gen. Oblig. Law § 5-701(1). New York law does not require that the parties' written memorialization be in one unified document, however. "It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion," Marks v. Cowdin, 226 N.Y. 138, 145 (1919), and these writings need not all bear the signature of the party to be bound, "provided that they clearly refer to the same subject matter or transaction." Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 55, 110 N.E.2d 551, 554 (1953). On the other hand, the writings, taken together, must contain all of the essential terms of

the agreement without reference to parol evidence, id. Furthermore, even after the parties "have reached agreement on the material terms of a contract, it may or may not become binding at that point depending solely on the intention of the parties," Bardo Sales, Inc. v. Miller-Wohl Co., 440 F.2d 962, 964 (2d Cir. 1971), and "the question of intent in this situation is uniquely one of fact." Id. at 965.

The defendant contends that, in the course of their negotiations, the parties never resolved their positions on many essential terms, including markets, withholding taxes, advertising costs, discounts, trademark control, selection of manufacturers, and an English translation of Cardin's standard license agreement. Memorandum of Law in Support of Defendant's Motion for Judgment Not-

withstanding the Verdict or, in the Alternative, for a New Trial ("Defendant's Memorandum of Law") at 12-26. To substantiate its stance, the defendant reviewed the case's crucial documents, four letters between Morse and Duquesnoy. The first was a letter from Duquesnoy to Morse, dated December 6, 1977, in which Duquesnoy enclosed a draft agreement (in French), which Morse should study and comment upon. Plaintiff's Exh. 22. Duquesnoy wrote: "I hereby give you the conditions we require to grant a license for the lighters PIERRE CARDIN": a three-year duration, from January 1, 1977 through December 31, 1979; a 10% royalty rate "on turnovers achieved, tax free"; and guaranteed minimum royalties of 60,000, 70,000, and 80,000 dollars for the first, second, and third years, respectively. Duquesnoy closed by men-

tioning the possibility of renewal "according to the royalties you will reach."

The second document was a letter from Morse to Duquesnoy, dated February 28, 1977. Plaintiff's Exh. 23. The body of the letter, in pertinent part, read as follows:

> It was a pleasure speaking with you today and gaining further understanding of our Pierre Cardin lighter project. Your contract did not indicate to us that we could have the proper protection and long range business prospects. As I mentioned on the telephone, we are very disappointed with the response from Prince of Japan in giving us new quotations and we are afraid to make a contract with you while having only one supplier.
>
> My partners have agreed in principal to form a new company and have not as yet picked the name because we have not gone far enough due to the problem set forth in our telephone conversation. The names of the partners are listed below and we all agree to your proposal to a guaranteed minimum for the

first year of business for $60,000.00 royalty, the second year $70,000.00, and $80,000.00 for the third year. For this guaranteed royalty our requests as set forth to you today are as follows:

1.- That we are allowed to buy from more than one source. All products carrying the Pierre Cardin label will of course be approved by you first. If we find a manufacturer of sufficient quality here in the U.S. or anywhere else in the world, we can submit samples to you for approval.

2.- Assignment of the Pierre Cardin on cigarette lighters for exclusive use in the U.S. by us only. This is to prevent other firms from capitalizing on our investment in advertising.

3.- Negotiations and contract in English so that we may know everything we are agreeing to.

4.- A renewal clause in a contract to permit us to exploit our investment over more than 3 years.

5.- Proposed new target date of responsibility to begin on July 1, 1977.

> We look forward to your early letter giving us the names and addresses of all firms presently manufacturing Pierre Cardin cigarette lighters throughout the world so that we may contact them for prices and delivery.
>
> Two of the partners are very active in the watch business. They request that I inquire as to the status of your Pierre Cardin watches and clocks here in the U.S. If these items are available, we know of factories in Switzerland and in the far east that can produce high quality products that can be sold. We would be interested in distributing this product also.

In response, Duquesnoy wrote to Morse on March 10, 1977, saying that he had spoken to Mr. Cardin personally about "the project with your house" and that Mr. Cardin "agrees on the conditions you propose to us," indicating the minimum royalties, the royalty rate of 10%, and a three-year duration commencing July 1, 1977, with a renewal if

Morse reached one million dollars in the third year. Plaintiff's Exh. 25. 1/ Regarding suppliers, Duquesnoy named three Japanese companies, Bronica Trading Company, Yoshinaga Prince & Company, and Kojima Precision Parts Company. Morse could get his supplies of lighters "from them and them only." Duquesnoy closed by saying: "As soon as you have contacted them [the Japanese companies] and have actually organized this supplying, will you be kind enough to let me know about it, very quickly, so that I can ask to [sic] our lawyer in New York, to start the wording of our contract which will begin on 1st July, 1977."

As soon as Morse received this letter, he replied with the following, Plaintiff's Exh. 26: 2/

Thank you for your letter of March 10th. We are pleased that you agree with our five points set forth in the letter of February 28th.

We take note that you have given us the names of three manufacturers in Japan as licensees for the Pierre Cardin cigarette lighters. If you will recall our telephone conversation you did mention that there were manufacturers in Italy and France that are presently manufacturing under your name. We would like to have these names to contact and inspect their line.

We also ask if you would permit us to find other manufacturers of quality cigarette lighters such as Maruman in Japan and more important firms in Taiwan and South Korea where there would be no import duty for us to pay and therefore allowing us to have highly competitive pricing for a more complete line.

We also mentioned in our letter in the last paragraph that we have partners interested in clocks and watches. We have not noticed any Pierre Cardin clocks being advertised here and we are presently importing Citizen clocks for sale. We know that Citizen has a Pierre Cardin clock and watches and

> assume that there are other manufacturers in Europe using this name. We are anxious to proceed with the fullest possible line and feel that the cigarette lighter, watches and mini alarm clocks can be sold in the same boutique.
>
> Once again we hope to visit you in Paris to complete verbal negotiations if it would be a benefit. Please let us hear from you at your earliest convenience.

In arguing that these documents are legally insufficient to evidence a contract, the defendant points out the numerous items which were never fully resolved. For example, on March 14, Morse asked Cardin to "permit us to find other manufacturers" because he was still displeased with the quality and import duties of the Japanese suppliers. Plaintiff's Exh. 26. And in the same letter he said: "Once again we hope to visit you in Paris to complete verbal negotiations if it would be a benefit."

In both the February 28 and March 14 letters, Morse spoke about a license agreement for watches and clocks as well as lighters. Most important, according to the defendant, the parties never negotiated or signed an integrated contract. Defendant's Memorandum of Law at 16-18. It was well known in the industry, and to Morse personally, that only Pierre Cardin could sign license agreements for his company. In addition, since the parties had not sat down to negotiate all of the fine points of their arrangement, they left unresolved many essential terms (which are mentioned in the French contract). In short, the defendant contends that, despite a preliminary agreement on royalties and duration, the parties could not, as a matter of law, have formed a contract without agreeing on

numerous other factors and without signing an integrated document.

In response, the plaintiff argues that the most important terms of the agreement were royalties and duration and that all other terms, although important, were not essential, as judged from the parties' perspectives. Memorandum of Law of Plaintiff in Opposition to Defendant's Motion for a Judgment Notwithstanding the Verdict or for a New Trial ("Plaintiff's Memorandum of Law") at 9-20. On the adequacy of the understanding between Morse and Duquesnoy, the jury was instructed that:

> In order for you to find that a contract existed, you must first find that the parties had agreed on all of the essential or principal elements of their arrangement. An essential term of a contract is one which affects the rights and duties of the parties in a substantial and important way.

> Now to find that the parties reached an agreement it is not necessary to find that they agreed on every element of the contract. But you must find that they agreed on all of the elements which they would have considered important to their rights and obligations.

Tr. at 468. Plaintiff's counsel, in his summation, argued that the exhibits "[show] what is essential to Mr. Cardin, one thing, money, nothing else. . . . That is to say, the nature of the deal, the duration and the price." Id. at 444. In refuting the importance of the other factors mentioned by Cardin, plaintiff states that "the jury could have concluded that these were not essential terms." Plaintiff's Memorandum of Law at 19 (first emphasis supplied). And despite the Court's own opinion about the completeness of the agreement, the plaintiff is correct that the jury could have reached the conclu-

sion it did reach about which terms were essential.

There is substantial evidence in the case for inferring that the parties had not reached a complete, enforceable contract. For example, Morse's letter of February 28, 1977 stated that he wanted "[n]egotiations and contract in English so that we may know everything we are agreeing to." Plaintiff's Exh. 23 (emphasis supplied). This suggests that Morse and his co-venturers were themselves concerned with detail and with assuring that their business prospects were fully spelled out, in English, before any obligations were undertaken. At trial, Morse testified that "I wanted the documents in English, and of course this [the letter of March 10, 1977] is in English." Tr. at 83. It would seem that the convenient coincidence that the

March 10 letter was in Engligh is not what Mr. Morse had in mind when he spoke of "the documents in English." The frequent references to draft contracts, to phrasings, and to lawyers suggest that more formal instruments were contemplated. Besides, Morse himself had asked for "negotiations and contract" in English, Plaintiff's Exh. 23; the March 10 letter could have been part of those English-language negotiations, leading up to an English contract.

Most important, the matter of suppliers was very much unresolved. Cardin recommended one Japanese firm. Morse asked for others, to which Cardin responded by allowing three Japanese firms, but "them only." Plaintiff's Exh. 25 (emphasis in original). Morse coolly responded: "We take note that you have given us the names of three

manufacturers in Japan." Plaintiff's Exh. 26. In the next paragraph, he continued, "We also ask if you would permit us to find other manufacturers," including those from other countries. Id. This was very important to the project, for as Morse stated in a telex dated March 26, 1977: "We want to handle better quality merchandise than that offered by Japan." Plaintiff's Exh. 31. Nonetheless, plaintiff argued at trial and on this motion that he was only asking for permission to find alternative sources; he was not demanding other sources as a condition to the deal. In the February 28, 1977 letter, Morse wrote: "If we find a manufacturer of sufficient quality here in the U.S. or anywhere else in the world, we can submit samples to you for approval." Plaintiff's Exh. 23. Although the

choice of sources undoubtedly would have affected Morse's performance of the contract, and its sales and profitability -- and probably would have affected the decision whether to enter the contract -- the jury apparently believed the plaintiff when he stated that he agreed to Cardin's restriction on suppliers, so long as Morse could submit other products for possible approval.[3/]

On a motion for judgment n.o.v., the Court must draw all inferences in favor of the party opposing the motion. Therefore, the jury's findings on the existence of a contract must stand. Similarly, the Court will not disrupt the jury's finding that the written correspondence was adequate to memorialize the parties' agreement. Indeed, if one starts with the proposition that

only the royalty rates and the duration were essential terms, then the letters were fully adequate as contracts because they stated and restated those terms. On whether an integrated contract was one of the essential terms, the jury apparently believed the plaintiff's testimony that a contract would merely "incorporate the basic facts that we have in [the correspondence of] February 28 and March 10" and "some minor facts . . . such as the dates and method of payment of [Cardin's] royalties." Tr. at 133-34. As in determining the contract's essential terms, the parties' intent governs the role of an integrated instrument.

> Two rules on this subject are well established: first, if the parties intend not to be bound until they have executed a formal document embodying their agreement, they will not be bound until then; and second, the mere fact that the parties

> contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event.

V'Soske v. Barwick, supra, 404 F.2d at 499 (citations omitted). These rules were paraphrased in the jury's instructions, Tr. at 470, and the jury apparently found that the parties intended to be bound before the drafting and signing of a complete agreement. This finding will not be disturbed.

Often, when courts enforce unwritten contracts which ordinarily would have been reduced to writing, the parties have at least begun their respective performances. See, e.g., Metro-Goldwyn-Mayer, Inc. v. Scheider, 40 N.Y.2d 1069, 392 N.Y.S.2d 252 (1976) (per curiam). When this happens, the parties forcefully demonstrate that they consider their agreement sufficiently complete

and clear in its essentials that performance can begin without a formal signed document. In Metro-Goldwyn-Mayer, Inc. v. Scheider, supra, the Court of Appeals quoted with approval the trial term's ruling that

> where the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matter will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement, if some objective method of determination is available, independent of either party's mere wish or desire. Such objective criteria may be found in the agreement itself, commercial practice or other usage and custom. If the contract can be rendered certain and complete, by reference to something certain, the court will fill in the gaps. [citations omitted]

75 Misc. 2d 418, 422, 347 N.Y.S.2d 755, 761 (Sup. Ct. 1972).

In this case, there was no partial performance. Indeed, Morse and his co-venturers never even formed the corporation that was to undertake the distribution of Cardin lighters. But this absence is by no means fatal to Morse's claims. Morse represented that the Morse Typewriter Company would provide the space and facilities needed for the lighter business, and Morse himself proposed to do most of the selling and administration himself, leaving only finance and overseeing to the other investors. On this basis, the jury could have found that the new company would have been ready by July 1, 1977, the starting date for the lighter license. After Morse received Duquesnoy's letter of March 24th, ending the project, the investors had no reason to form the corporation and make capital contributions.

Regarding the gaps in the parties' agreement, the jury was instructed as follows:

> To contain the essential elements of the contract, the writing or writings can either state the parties' agreement or it may refer to other writings or other nonwritten standards for inferring what the parties agreed to. But if any term is to be supplied by inference, the source of the inference must be readily ascertained and it must be objective.
>
> In other words, the writings must be complete enough and the reference to other sources must be certain enough that you can understand the contract completely and fairly on the basis of what the writing contains.
>
> You must have confidence that your understanding of the contract is in complete accordance with the intention of the parties on all terms and conditions which would be important to them.

Tr. at 468-69. Presumably the jury accepted and obeyed this instruction in considering the completeness of the terms and the completeness of the writ-

ings. As such, and in accordance with New York's preference for enforcement rather than rescission of contracts, see Lee v. Joseph E. Seagram & Sons, Inc., supra, 413 F. Supp. at 697-98, the jury verdict on the existence of a contract must stand.[4/]

Amount of Damages

It is well-established that lost profits are an appropriate element of damages for breach of contract where "the loss of prospective profits are the direct and proximate result of the breach; profits were contemplated by the parties when they entered the contract; and there is a rational basis on which to calculate profits." Perma Research & Dev. Co. v. Singer Co., 402 F. Supp. 881, 898 (S.D.N.Y.), aff'd, 542 F.2d 111 (2d Cir. 1975); cert. denied, 429 U.S. 987 (1976); Freund v. Washington Square

Press, Inc., 34 N.Y.2d 379, 357 N.Y.S.2d 857 (1974). Of course, our confidence in the amount awarded for lost profits is greatest when the business involved has a track record or when the subject matter of the contract is actually put to its intended use by someone other than the plaintiff. E.g., Western Geophysical Co. v. Bolt Assoc., 584 F.2d 1164 (2d Cir. 1978) (licensor wrongfully abrogated license agreement and used the license to generate its own profits, which became strong evidence of the profits lost). But the lack of a complete track record is not fatal to a claim of lost profits. For Children, Inc. v. Graphics Int'l, Inc., 352 F. Supp. 1280 (S.D.N.Y. 1972). "The whole matter is a question of the evidence." William Goldman Theatres v. Loew's, Inc., 69 F. Supp. 103, 105-106 (E.D. Pa.

1946), aff'd, 164 F.2d 1021 (3d Cir.), cert. denied, 334 U.S. 811 (1948). "[I]t will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). "Also, where there is a contract and the breach thereof causes harm to a plaintiff and the only difficulty is in measuring the harm, the law will not allow a defendant to escape liability merely because the fixing of damages is difficult or imprecise." Lee v. Joseph E. Seagram & Sons, Inc., supra, 413 F. Supp. at 707. "The wrongdoer should bear the risk of uncertainty that his own conduct has created." Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 565 (2d Cir. 1970). The only restriction is

that "the jury may not render a verdict based on speculation or guesswork." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946); Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 909-10 (2d Cir.), cert. denied, 369 U.S. 865 (1962).

These principles were summarized and described for the jury after the trial on damages. Tr. at 775-78. The Court's instructions stressed that a damage award, if any, was intended only to compensate the plaintiff, that the plaintiff had the burden of proof, that the jury could interpret evidence but could not speculate about damages, and that punitive damages were not part of the case. Upon reviewing these charges, the Court finds that they completely and accurately reflect the law on lost profits, leaving only the sufficiency of the

evidence as a basis for the defendant's present motion.

The crux of the problem on damages is that, while the Court found the defendant's purported expert unqualified to give his opinions about Morse's damages, Tr. at 709, the plaintiff offered the testimony of Mr. George P. Dinnerman, whom the Court found -- and still finds -- qualified to testify on the issue of lost profits. Dinnerman has had over twenty years' experience in sales and sales management for several major importers and distributors of cigarette lighters. Although some question was raised about the extent of his experience with high-priced lighters, see defendant's Memorandum of Law at 43, Dinnerman testified that the Ronson Corporation, which he left in 1970, did approximately 35% of its business in

lighters priced between $40 and $90, Tr. at 645, and since 1970 he has been familiar with lighters "above the $30 range" which he called "the dividing line insofar as classification," Tr. at 646. In addition, he has had experience with several of the particular lighter models Morse intended to sell. Plaintiff's Memorandum of Law at 32. More importantly, forecasting constituted a substantial portion of Dinnerman's responsibilities in his various positions, Tr. at 590, 594, 597, 602, 604, 606, and his projections covered large geographic areas, eventually including the entire continential United States, with some contacts in international markets. On the basis of his extensive familiarity with forecasting and sales of cigarette lighters, the Court was convinced, and remains convinced, that

Dinnerman is a qualified expert on the subject.

The strength, accuracy, and admissibility of his predictions of Morse's lost profits is another matter. Most generally, Cardin argues that "there is no . . . competent evidence from which any rational deduction by an expert can be made. There is only self-serving speculation based on hearsay, and on the hopes and wishes of Morse, relied upon by an 'expert' who had no experience in the field of selling a designer lighter at a similar price bracket in ten years, and who made no independent evaluation of the expenses, costs, and ultimate marketing success." Defendant's Memorandum of Law at 51-52. As discussed above, the Court was satisfied that Dinnerman's background qualified him to speak on the issue of damages in this

case. Regarding any infirmity of his predictions, see Plaintiff's Exh. 57, the defendant had ample opportunity to cross-examine the witness and did so. The Court is not convinced, however, that Dinnerman's testimony should be excluded under Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra, 297 F.2d at 912, where the Second Circuit warned against "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." In Herman Schwabe, the expert used a market share for one year (based upon an assumed total market) and applied that figure to six years' sales in many different markets. In addition, that case arose under the antitrust laws, where the question of causation is immensely complicated be-

cause both legal and illegal practices contributed to the defendant's market share. Third, "[t]here was no showing either that [the plaintiff] ever had competed, or even that but for [the defendant's] unlawful acts it would have competed, as to all the 24 types [of machines]; further, the evidence made it plain that as to some types with respect to which it had competed the [plaintiff's] product was higher in cost or lower in quality or delivery terms." Id. at 911.

These facts are distinguishable from Dinnerman's predictions for Cardin lighters. After comparing the proposed Cardin lighters with many other brands, Dinnerman set out to evaluate only one market, "the refillable market." He assessed "what had been happening in the refillable market over the past years,

the impact that disposables had had upon refillables on the low end refillables, on the high end refillables, and came up with an individual breakdown by units of seven items that [he] was making [his] forecast on." Tr. at 608-09. He "checked the number of retail outlets where [he] thought these lighters could be sold." Id. The additional factors he considered were: Cardin's "very strong consumer image," Tr. at 612; its status as a gift item in competition with "jewelry and/or designer type lighters," id.; the selling network available to Swank, Inc., which already held the lighter license; the sales of lighters in Canada, as reported by the supplier of Cardin lighters, as well as the 10-to-1 ratio he had come to expect between American and Canadian sales, Tr. at 613-14; and government figures for refillable lighters.

What this indicates is that Dinnerman, a man well acquainted with products and markets closely related to those Morse was considering, studied numerous relevant elements which would go into predicting market performance for one product in one market. Unlike in Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra, the defendant's breach of contract was clearly the cause of whatever losses the plaintiff suffered, and the plaintiff (who already had some experience selling Cardin lighters and whose partners were familiar with other jewelry products) clearly planned to enter the market, where there was no other designer lighter in direct competition. Tr. at 684.

Concededly, there were elements of estimation in Mr. Dinnerman's predictions. But estimation is endemic in the

process of forecasting, and the Court is satisfied that the expert placed enough reasonably reliable, pertinent information in front of the jury that they could reach a rational verdict. Defendant complains that Dinnerman's report rested on two particularly objectionable pieces of information. One was a telex from the Japanese supplier of Cardin lighters in Canada; the other was Morse's own estimate of costs and sales, drawn up in December 1976 in anticipation of the license contract. The fact that Dinnerman relied on the telex, Plaintiff's Exh. 61, is unobjectionable because he testified that the documents he used in arriving at his projections were of "the type that have been relied upon by [him] in the past to make projections of cigarette lighter sales and net profits." Tr. at 611. Fed. R. Evid. 703.

The second document was admitted into evidence as part of the testimony of a fact witness. Plaintiff's Exh. 91, Tr. at 523. As the Court informed the defendant's counsel at that time, "you are at liberty to cross-examine [Morse] on it," id., which counsel did. In short, the telex and Morse's projections were properly included in Dinnerman's estimates. Whether they support the expert's conclusions was a matter for cross-examination.

The defendant's numerous arguments in the brief on this motion were also more properly addressed to the jury which had to weigh the evidence. These arguments included the following: Morse's sales should have been judged by Swank's sales, even though Swank sold hundreds of other Cardin products; the calculations based upon the Canadian

sales contained many potential sources of error; overhead, salesmen, and discounts would have inflated Morse's costs; Morse's record in duty-free shops indicates that his sales generally would have been lower than predicted; and businesses generally may fail. Defendant's Memorandum of Law at 45-53. Much of this was brought out in defendant's cross-examination of Dinnerman and in the defendant's summation. Apparently the jury somewhat agreed with the defendant that Dinnerman's report, Plaintiff's Exh. 57, overstated Morse's prospects because it returned a verdict of $435,000, which was approximately one quarter of the 1.8 million dollars projected. If defendant could have substantiated its contention that Morse would have lost money on this venture, it should have brought an expert

similarly qualified to opine on the subject of cigarette sales, instead of bringing a Swank officer whose expertise was in men's furnishings generally and whose familiarity with lighter sales rested only on his knowledge of a few sales figures. The fact that Dinnerman was not effectively rebutted does not mean that his estimates were irrational, or that his information failed to give the jury a rational basis for arriving at a verdict. Once one accepts the jury's finding that the parties had concluded a contract, then the damage award seems reasonable.

Fraudulent Misrepresentation

The parties agree that the Court correctly charged the jury on the elements constituting fraud. Defendant's Memorandum of Law at 27; Plaintiff's Memorandum of Law at 47-48. Fraud can

rest upon knowledge or recklessness in making a representation. The Court agrees with the defendant that the jury could not find knowledge on the part of Duquesnoy. The evidence showed that Duquesnoy was young, fairly inexperienced, new to his job, and not fully informed about the existing Cardin contracts, including the contract with Swank which already held a license for cigarette lighters. But the jury could have found that Duquesnoy was reckless in representing to Morse that the license was still available.

In response to a question from the jury, the Court explained that "'[s]cienter, which means knowledge, . . . includes not only misrepresentations but also reckless indifference to error, a pretense of knowledge, and the misrepresentation of a material fact

susceptible of accurate knowledge but stated as true on personal knowledge of the representer.'" Tr. at 497, quoting Morse v. Swank, Inc., 459 F. Supp. 660, 667 (S.D.N.Y. 1978). The Court added: "Now, that means that it is not negligent, but it is something considerably more than negligence." Tr. at 497. On the basis of these instructions, and in light of the evidence in the case, the jury could have reasonably concluded that Duquesnoy was recklessly indifferent about the effect he had on Morse.5/ Duquesnoy testified by deposition that he was unaware of Swank's license for lighters, yet he was aware that Swank held a license on cigarette cases. His deposition, as a whole, gave the impression that he was uncooperative and evasive. In addition, another Cardin employee, Eduoard St. Bris, with whom

Duquesnoy had close contact, was negotiating with Swank about a line of lighters at the same time that Duquesnoy was negotiating with Morse. From all of this, the jury could have drawn the inference that Cardin's agent acted recklessly.

Regarding damages, even if the finding of fraudulent misrepresentation were overturned, the verdict would not be affected because Morse's counsel asked for only nominal damages on this claim. Tr. at 778.

Mutual Mistake

The problem of mutual mistake is the thorniest in the case. But as the defendant conceded: "Because the issue of mutual mistake carries with it the requirement of innocent misrepresentation, . . . if the jury's verdict on fraud is permitted to stand, the discussion of

mutual mistake will no doubt be rendered moot." Defendant's Memorandum of Law at 3*.

As a matter of equity, a contract can be rescinded if both parties were mistaken about a material fact.

> The legal concept of "mistake" is similar to the legal concept of "misrepresentation" in that, under each, a party to a contract may be relieved from his obligations if he was unaware of certain material facts. "Mistake", however, is only such error as is made without representation or deception by the other party to the transaction. 13 Williston on Contracts § 1540 (3d ed. 1970). Where the mistake is unilateral, the contract is not voidable. But where both parties assume a certain state of facts to exist, and contract on the faith of that assumption, they can be relieved from their obligations if the assumption is erroneous. See Baumann v. Florance, 267 App. Div. 113, 114, 44 N.Y.S.2d 706, 707 (3d Dept. 1943).

Leasco Corp. v. Taussig, 473 F.2d 777, 781 (2d Cir. 1972) (emphasis supplied); Tinkess v. Burns, 24 A.D.2d 545, 261

N.Y.S.2d 472 (4th Dep't 1965) (rescission available for "innocent misrepresentations" "unknown to the parties at the time of the execution of the agreement").

Of course, a court should not deny rescission and enforce a contract where doing so would be unjust. As stated in Baumann v. Florance, supra, "mutual mistake as to a material fact will avoid a contract regardless of the negligence of either party unless a change in position renders it unjust." 44 N.Y.S.2d at 707 (emphasis supplied). In other words, negligence is excusable so long as the parties can be made whole. "[M]istakes by definition reflect oversight or some lack of care and so the requirement that the mistake occur in the exercise of ordinary care may not be interpreted narrowly. The question is whether the mistake is of the variety considered

excusable and each case must be considered on its own facts." Balaban-Gordon Co. v. Brighton Sewer Dist., 41 A.D.2d 246, 342 N.Y.S.2d 435, 439 (4th Dep't 1973).

Even though a finding of fraud is not a requisite for the relief of rescission, see Tinkess v. Burns, supra, a finding of fraud is sufficient to show that Duquesnoy was not innocently mistaken. In addition, although Morse appears to have been misled even before he contacted Cardin's Paris office, the jury's finding of fraudulent misrepresentation or reckless indifference suggests that Duquesnoy inexcusably failed to inquire and to inform Morse about Swank's existing license. The Court expressed its opinion when it commented, outside the hearing of the jury, that "[u]nfortunately this case [is] very

interesting because it's a comedy of errors." Tr. at 391. Shortly thereafter, the Court said, "It's not mutual mistake, it's universal mistake." But the jury apparently arrived at a different conclusion about the innocence of Cardin's business practices. Accordingly, the Court will defer to the fact-finder's verdict and uphold its view that there was no mistake. The Court's charge on mistake was as follows:

> [I]f both parties honestly believed that the license was still available and open to negotiation, then you may find that there was a mutual mistake. But if either Mr. Morse or Mr. Duquesnoy knew that the Cardin license for cigarette lighters had been given to Swank, then you may find that there was no mutual mistake.

Tr. at 472-73. Furthermore, the Court explained that negligence was not enough to find that Duquesnoy "knew" of Swank's license. Id. The Court will not assume that the jury ignored this instruction.

Real Party in Interest

Defendant also argues that Morse is not the real party in interest because the assignment from two of his co-venturers is inadequate, because a third co-venturer who withdrew from the project never gave him an assignment, and because his co-venturers never formed the corporation they promised to form. Defendant's Memorandum of Law at 54-56. In a Memorandum in this case, dated October 11, 1978, the Court wrote: "New York law . . . does not take a rigid view of assignments. . . . . At best the challenges to the assignment merely point to factual matters unclear on the record." Its view has not changed on the subject.

First, the fact that the corporation was never formed is neither a surprise

nor a bar to the assignment of claims. This Court will not rule that, even after Duquesnoy ended the project, the co-venturers were required to capitalize a $300,000 corporation just to pursue a damage claim. Second, as the plaintiff points out, the defendant never asked for a jury charge directed to the "factual matters" which the Court found "unclear on the record," as of October 11, 1978. See Plaintiff's Memorandum of Law at 55. Despite the generality of the assignment, the nature of the claims referred to was quite clear. If the defendant failed to specify its arguments about the assignment's inadequacy and failed to present its arguments to the jury, the Court will not now rule that, as a matter of law, the assignment was inadequate.

New Trial

As an alternative to its motion for a judgment notwithstanding the verdict, the defendants seeks a new trial, an option permitted by Fed. R. Civ. P. 50(b). Most of Cardin's arguments for a new trial amount to recitations of points it would like to make more forcefully to the jury if given another chance. See Defendant's Memorandum of Law at 57-61. In addition, Cardin objects to several specific defects it finds in the conduct of the trial. More particularly, Cardin objects to the introduction of Plaintiff's Exh. 26, the March 14, 1977 letter from Morse to Duquesnoy. This letter was surely admissible as it bore on the parties' intent, and the Court expressly instructed the jury that Duquesnoy could not be considered bound by Morse's statements, Tr. at 470-72.

Also, Cardin objects to the admission into evidence of several documents pertaining to damages. Plaintiff's Exhs. 66-68, 91. As it did at trial, the Court still finds these documents admissible, although their weight was a matter for the jury to decide. If Cardin had offered more competent evidence on the issue of damages, the jury might not have believed Morse's case as far as it did. But this observation does not mean that the plaintiff's exhibits should have been taken away from the jury, nor that a new trial is needed to remedy the shortcomings in the defendant's case. Finally, Cardin argues that the Court should have charged clear-and-convincing evidence instead of preponderance-of-the-evidence on the issue of fraud. Because Cardin failed to object to the Court's instruction before

the jury retired to deliberate, it cannot now assign as error the Court's charge on burden of proof. Fed. R. Civ. P. 51.

Conclusion

The defendant's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial is denied.

So ordered.

Dated: New York, New York
August 5, 1981

S/ CHARLES H. TENNEY
U.S.D.J.

MARVIN W. MORSE,
Plaintiff,
-against-
SWANK, INC., et al.,
Defendants.

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1/ Among its other arguments, Cardin asserts that Duquesnoy lacked authority to bind his company "absent a final written singular document prepared by attorneys, negotiated by attorneys, approved by Pierre Cardin, and signed by Cardin personally." Defendant's Memorandum of Law at 23.

As buttressed by all of the evidence describing the course of contact between Morse and Duquesnoy, Plaintiff's Exhibit 25 lays to rest any possible claim that Duquesnoy lacked authority. The document specifically states that Duquesnoy "saw Mr. Pierre CARDIN concerning the project . . . [He] agrees on the conditions you proposed to us." Even if Duquesnoy lacked actual authority, he probably enjoyed apparent authority all along, and he certainly did after Morse received the March 10th letter. See International Telemeter Corp. v. Teleprompter Corp., 592 F.2d 49, 55 (2d Cir. 1979).

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2/ The defendant objected to having this document included with the three other exhibits purportedly creating a contract. Plaintiff's Exh. 26 was signed only by Morse and not by Duquesnoy. The Court pointed this out out to the jury, Tr. at 471-72, and allowed the document to be considered insofar as it bears upon the parties' intent to be bound.

3/ On the issue of suppliers, the plaintiff's brief includes an odd statement: "Obviously, Morse would not have asked for permission if he did not feel bound to a contact which he felt was still being negotiated . . . ." Plaintiff's Memorandum of Law at 20 (second emphasis supplied). First, the Court does not weigh heavily Morse's use of the verb "permit." One can demand permission or request it. Second, Morse surely did not mean that the contract itself was still under negotiation; he must have meant that the permissibly unfinished terms, such as the full range of possible suppliers, were "still being negotiated."

4/ In their memoranda, neither of the parties mentioned the case of International Telemeter Corp. v. Teleprompter Corp., 592 F.2d 49 (2d Cir.

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1979). The plaintiff apparently uncovered the precedent--a string cite on pages 6 to 7 of the Plaintiff's Memorandum of Law quotes almost verbatim a string cite, including parentheticals, which appears in 592 F.2d at 56--but he did not direct the Court's attention to the context in which he found his legal authoirty.

One might infer from this that Morse considered the legal principles in International Telemeter helpful to his cause, but that he wanted to avoid any application of its facts to the facts in this case. The Court finds that the facts of International Telemeter are somewhat damaging to the plaintiff's position, but that this case is ultimately distinguishable.

In International Telemeter, the district and appeals courts enforced a settlement agreement even though it had never been delivered to the plaintiff and there was a considerable dispute about whether it had been fully and properly executed by the defendant. The facts were as follows: The plainitff instigated a patent infringement suit against several defendants. After the reso-

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lution of pretrial motions, the remaining defendants were Teleprompter Corporation, Hamlin International Corporation, and an individual, Philip D. Hamlin. The parties negotiated a settlement for nine months, hashing out numerous details until they had arrived at an acceptable draft. Then, just before the agreement was to have been executed, the two Hamlin defendants withdrew. Teleprompter advised the plaintiff that the settlement should proceed without the Hamlin defendants. The drafts were revised to remove the references to the Hamlin defendants; several copies were delivered to Teleprompter, whose counsel advised International Telemeter that they had been signed; and then Teleprompter's new management refused to proceed with the agreement, notifying the plaintiff that defendant's counsel had been mistaken when he advised them that the agreement had been executed. At trial, the district court found that the agreement had been signed and that the parties intended to be bound prior to the signing and delivery of the document. The court of appeals affirmed on the basis of those findings. 592 F.2d at 55-56.

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The facts of International Telemeter are damaging to Morse in several ways. First, the case shows that detailed negotiations are often critical to the shape of a final agreement. Second, when the courts enforced the settlement agreement, there was no ambiguity about its terms because so many items had been considered and defined. Third, in holding the defendant to its agreement, the courts could point to letters from the defendant's representatives stating that Teleprompter would go ahead with the settlement on the terms already worked out. None of these factors is present in Morse's case.

On the other hand, the standard endorsed by the court of appeals is broad enough to justify the jury's verdict. The court wrote: "Whether or not the parties have manifested an intent to be bound must depend in each case on all the circumstances." 592 F.2d at 56. In this case, the plaintiff argued that the parties intended to be bound before they committed their arrangement to writing and that the general terms about royalties and duration were sufficient, according to their intention, to complete the contract. The jury agreed, and this Court will not upset that verdict.

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In a concurring opinion in International Telemeter, Judge Friendly expressed some reservations about the court's decision. He agreed that negotiators should not be allowed to withdraw right up until a document is signed and delivered, despite the parties' completion of a detailed agreement. But he wrote that "when the parties have manifested an intention that their relations should be embodied in an elaborate signed contract, clear and convincing proof [should be] required to show that they meant to be bound before the contract is signed and delivered." 592 F.2d at 58. Such proof "could consist in one party's allowing the other to begin performance [citations omitted] or in unequivocal statements by the principals or authorized agents that a complete agreement had been reached and the writing was considered to be of merely evidentiary significance." Id. These suggestions, however, are not yet the law of this circuit.

5/ The Court finds highly farfetched the plaintiff's suggestions about Duquesnoy's "motives" in misleading Morse. See Plaintiff's Memorandum of Law at 52-53. Morse theorizes that Cardin hoped to goad Swank into

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exploiting its license for cigarette lighters by opening negotiations with a new licensee, namely Morse. However, with the lighter license already included in Swank's contract, Duquesnoy could only invite a lawsuit by negotiating a competing contract with Morse. And as we can all see, a lawsuit is exactly what Cardin got.

On the other hand, the jury could have believed Morse's unlikely tale. In the depositions read to the jury, Cardin and Duquesnoy gave the impression that they were uncooperative, arrogant, and evasive and that they knew nothing about the subject matter of the suit. From this, the jury might have decided that they had hoped to strong-arm Swank by threatening to re-license the right to distribute lighters to Morse.